

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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MARK PICOZZI,

Plaintiff,

v.

CLARK COUNTY DETENTION CENTER,
et al.,

Defendants.

Case No. 2:15-cv-00816-JCM-PAL

ORDER

(Mot. Serve Subpoena – ECF No. 32;
Mot. Proof Service – ECF No. 43;
Mot. Serve Defs. – ECF No. 44)

This matter is before the court on Plaintiff Mark Picozzi's Motion to Serve Subpoena to Unserved Defendants (ECF No. 32), Motion for Proof of Service (ECF No. 43), and Motion for an Order to Serve Defendants (ECF No. 44). These Motions are referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(A) and LR IB 1-3 of the Local Rules of Practice.

BACKGROUND

Mr. Picozzi is a pro se prisoner currently in the custody of the Nevada Department of Corrections. He has received permission to proceed in this case *in forma pauperis* ("IFP") pursuant to 28 U.S.C. § 1915 and LSR 1-1 of the Local Rules of Practice. *See* IFP Application (ECF No. 3); Screening Order (ECF No. 15). This case arises from Picozzi's allegations, pursuant to 28 U.S.C. § 1983, regarding his treatment while he was incarcerated at the Clark County Detention Center ("CCDC"). Upon review of the Amended Complaint (ECF No. 14), the court issued a Screening Order (ECF No. 15) finding that Picozzi stated the following plausible claims: (1) Eighth Amendment claim of excessive force against Defendants Sergeant Judd and Officer Garcia, as well as John Doe correctional officers #1 and #2; (2) Eighth Amendment claim of deliberate indifference to a serious medical need against Defendant Officer Hightower and Jane Doe nurse #1; (3) Fourteenth Amendment claim of violation of access to the courts against Defendant

1 Officers Hightower, Daos, Goins, Hans, Brooks, Phillips, Carr, Jolley, and Coker, as well as John
 2 Doe correctional officers #4 and #5; and (4) First Amendment claim of interference with his right
 3 to legal correspondence against Defendant Razzo and John Doe CCDC mail room officer. *Id.* at
 4 14. By acknowledging that his claims implicate doe defendants, Mr. Picozzi was given an
 5 opportunity through discovery to identify the unknown defendants. *Id.* at 14 n.6–9.

6 The court directed the Clerk of the Court to issue summons to the named defendants and
 7 instructed Picozzi to provide the U.S. Marshals Service (“USM”) with the information to serve
 8 them. *Id.* He was instructed that, if the USM returns any summons unexecuted for any
 9 defendant(s) and he wishes to have service attempted again on an unserved defendant(s), he must
 10 file a motion “identifying the unserved defendant(s) and specifying a more detailed name and/or
 11 address for said defendant(s), or whether some other manner of service should be attempted.” *Id.*

12 Defendants Coker, Daos, Goins, Hightower, Judd, and Phillips (“CCDC Defendants”) were served on March 23, 2016. *See* Executed Summons (ECF No. 21). Mr. Picozzi properly
 13 submitted the USM-285 forms for Defendants Brooks, Carr, Garcia, Hans, Jolley, Razzo
 14 (“Unserved Defendants”); however, the USM was unable to locate these Unserved Defendants or
 15 complete service. *See* Unexecuted Summons (ECF No. 20). On April 4, 2016, Picozzi filed a
 16 Motion to Serve the Unserved Defendants (ECF No. 23). The motion was denied; however, the
 17 court instructed the Clerk of the Court to resend Picozzi twelve USM-285 forms and directed him
 18 to complete the forms to again attempt service. *See* July 29, 2016 Order (ECF No. 31).

19 DISCUSSION

20 **I. MR. PICOZZI’S MOTIONS (ECF Nos. 32, 43, 44)**

21 The current motions ask the court to enter orders: (1) to issue and serve a subpoena on
 22 CCDC and, (2) to instruct the USM to serve the Unserved Defendants. The proposed subpoena
 23 presents questions to the custodian of records for CCDC to identify the Unserved Defendants’ full
 24 names and badge numbers. *See* Mot. to Serve Subpoena (ECF No. 32). Picozzi requests the
 25 information to further his efforts to accomplish service. *Id.* In August 2016, he completed the
 26 new USM-285 forms he received as a result of the July 29, 2016 Order (ECF No. 31), and returned
 27 the forms via mail to the USM. *See* Mot. Proof of Service (ECF No. 43). Approximately three
 28

1 weeks later, Picozzi had not received a response from the USM. *Id.* Thus, he filed the motion
 2 requesting the status of service. *Id.* Shortly thereafter, he filed a new motion attaching a response
 3 letter from the USM, dated September 8, 2016. *See* Mot. for Order to Serve (ECF No. 44). The
 4 USM informed Picozzi that it needs a court order directing service of the summons and complaint
 5 on the Unserved Defendants. *Id.* Thus, he filed the motion requesting such an order. *Id.* The
 6 court will address these requests in turn.

7 **II. SUBPOENA TO CCDC**

8 To obtain the information required to serve a defendant, a plaintiff may use whatever
 9 resources and means are available to him, including but not limited to: (1) contacting persons who
 10 a plaintiff believes were witnesses to the alleged incident that forms the basis the action; (2)
 11 contacting a defendant's counsel or previous counsel; (3) obtaining from the appropriate source(s)
 12 copies of jail records concerning the alleged incident, such as any records of a plaintiff's
 13 administrative grievance or medical records; and/or (4) utilizing the subpoena procedure
 14 authorized by Rule 45 of the Federal Rules of Civil Procedure.¹

15 A party may compel a person who is not a party to an action to produce documents for
 16 inspection and copying pursuant to a subpoena *duces tecum*. *See* Fed. R. Civ. P. 34(c), 45(a).
 17 Pursuant to the IFP statute, 28 U.S.C. § 1915, the USM is required to "issue and serve all *process*"
 18 for an indigent plaintiff, but the statute does not include service of subpoenas. *See* § 1915(d)
 19 (emphasis added). Thus, an IFP plaintiff is responsible for paying all fees and costs associated
 20 with subpoenas. *Tedder v. Odel*, 890 F.2d 210, 211, 211–12 (9th Cir. 1989) (finding that § 1915
 21 provides for service of process for an indigent's witnesses but "does not waive payment of fees or
 22 expenses for those witnesses"); *see also* *Dixon v. Ylst*, 990 F.2d 478, 480 (9th Cir. 1993). However,
 23 when a plaintiff states a colorable claim against a defendant corrections officer but lacks
 24 information to fully identify or locate the officer, the plaintiff must be given the opportunity to
 25 discover the identity of the officer from the corrections facility. *See, e.g., Cottrell v. Unknown*
 26 *Corr. Officers, 1-10*, 230 F.3d 1366 (9th Cir. 2000) (unpublished).

27
 28 ¹ All references to a "Rule" or "Rules" in this Order refer to the of the Federal Rules of Civil Procedure.

1 Here, Mr. Picozzi has stated colorable claims against the Unserved Defendants but he lacks
2 sufficient information to allow the USM to serve them. To expedite resolution of the case on the
3 merits and in lieu of directing issuance of a subpoena *duces tecum*, the court will direct that counsel
4 for the CCDC Defendants investigate and provide to the court *under seal* the full names, badge
5 numbers, last known addresses, and telephone numbers of the Unserved Defendants. This will
6 protect the confidential personal identification and location information of law enforcement
7 personnel but provide the USM with the information needed for service. Counsel for the CCDC
8 Defendants will also be required to file a notice on the public docket stating that they have
9 complied with this Order. Once Picozzi receives notice of compliance, he must file a motion
10 requesting an order for USM service within 14 days. The court therefore grants the Motion to
11 Serve Subpoena (ECF No. 32) in part and will direct counsel for the CCDC Defendants to submit
12 the Unserved Defendants' personal information under seal and file a notice of compliance on the
13 public docket. Picozzi will have 14 days from the notice of compliance to file a motion requesting
14 an order directing the USM to serve the Unserved Defendants.

15 **III. PROOF OF SERVICE**

16 The Motion for Proof of Service (ECF No. 43) requests the status of service for the
17 unserved Defendants. However, Mr. Picozzi has now received a response letter from the USM
18 informing him that it needs a court order directing service of the summons and complaint on the
19 Unserved Defendants. The USM's letter provided the status of service. Thus, the motion is denied
20 as moot.

21 **IV. SERVICE OF PROCESS**

22 Rule 4 governs service of process, a formal delivery of documents that is legally sufficient
23 give the defendant notice of a pending action. *R. Griggs Group Ltd. v. Filanto Spa*, 920 F. Supp.
24 1100, 1103 (D. Nev. 1996) (citing *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694
25 (1988)). Rule 4(m) states that a defendant must be served within 90 days after a complaint is filed.
26 A court may dismiss an action without prejudice if the summons and complaint are not served on
27 the defendants within 90 days or such further time as ordered by the court. *Id.*; see also *Efaw v.*
28 *Williams*, 473 F.3d 1038, 1041 (9th Cir. 2007). Rule 4(m) requires the court to extend the time

1 for service if a plaintiff shows good cause for the failure to timely serve the complaint. As a
 2 general matter, a showing of good cause requires more than simple inadvertence, mistake of
 3 counsel, or ignorance of the procedural rules. *Martin v. Longbeach*, 246 F.3d 674 (9th Cir. 2000).
 4 “At a minimum, good cause means excusable neglect.” *Id.*

5 In cases involving an incarcerated pro se plaintiff, Rule 4 requires the USM to serve the
 6 summons and the complaint upon order of the court. Fed. R. Civ. P. 4(c)(3); 28 U.S.C. § 1915(d).
 7 Thus, an incarcerated plaintiff is entitled to rely on the USM for service of the summons and
 8 complaint and “should not be penalized by having his action dismissed for failure to effect service”
 9 if the USM or the court clerk failed to perform their duties. *Puett v. Blandford*, 912 F.2d 270, 275
 10 (9th Cir. 1990). However, it is the plaintiff’s responsibility to provide the USM with information
 11 necessary to identify each defendant to be served. *See Walker v. Sumner*, 14 F.3d 1415, 1422 (9th
 12 Cir. 1994), *abrogated on other grounds*, *Sandin v. Conner*, 515 U.S. 472 (1995). “So long as the
 13 prisoner has furnished the information necessary to identify the defendant, the marshal’s failure to
 14 effect service is ‘automatically good cause’ ” for an extension of the service deadline. *Walker*, 14
 15 F.3d at 1422 (quoting *Sellers v. United States*, 902 F.2d 598, 603 (7th Cir. 1990)). Thus, although
 16 an incarcerated plaintiff is entitled to rely on the USM for service, that reliance is only proper when
 17 he has provided the USM with accurate and sufficient information to effectuate service. *Puett*,
 18 912 F.2d at 275; *Walker*, 14 F.3d at 1421–22.

19 **A. The Unserved Defendants**

20 Here, the court construes the Motion for Order to Serve (ECF No. 44) as a request for an
 21 extension of time to complete service. Mr. Picozzi properly submitted a USM-285 form; however,
 22 the USM was unable to locate the unserved Defendants. *See Unexecuted Summons* (ECF No. 20).
 23 He timely filed his motion requesting a subpoena to gather additional information to complete
 24 service. Picozzi has shown good cause to extend the time for service. The court therefore grants
 25 the Motion as to the unserved Defendants.

26 As stated above, the court will direct counsel for the CCDC Defendants to file with the
 27 court under seal full name, badge number, address, and telephone number of the unserved
 28 Defendants, and file a notice of compliance on the public docket. Picozzi will then have 14 days

1 to file a motion requesting an order directing the USM to serve the unserved Defendants. The
 2 court will then reset the service deadline and the USM will reattempt service. However, Picozzi
 3 is cautioned that he is ultimately responsible for providing the USM with accurate and sufficient
 4 information to effectuate service. If the USM is unable to serve the Unserved Defendants with the
 5 information provided in the notice and he wishes to have service attempted again, he must file a
 6 timely motion specifying a more detailed name and/or address for each defendant, or whether some
 7 other manner of service should be attempted. Pursuant to Rule 4(m), Picozzi's failure to comply
 8 with this Order by accomplishing service will result in a recommendation to the district judge that
 9 the Unserved Defendants be dismissed from this case without prejudice.

10 **B. Nurse Amanda**

11 Mr. Picozzi requests that the order for service include "Nurse Amanda." *See* Motion for
 12 Order to Serve (ECF No. 44). Nurse Amanda was not specifically named as a defendant in his
 13 Amended Complaint (ECF No. 14). However, the Screening Order (ECF No. 15) states that the
 14 "Eighth Amendment claim of deliberate indifference to his serious medical need also implicates
 15 Jane Doe nurse #1. ... This claim shall proceed against Jane Doe nurse #1 when the plaintiff
 16 learns her identity." *Id.* at 14 n.7. The motion does not indicate whether Nurse Amanda is, in fact,
 17 Jane Doe nurse #1 or a different doe defendant.

18 The Ninth Circuit has held that where when a plaintiff does not know the identity of a
 19 defendant prior to filing a complaint, he "should be given an opportunity through discovery to
 20 identify the unknown defendants, unless it is clear that discovery would not uncover the identities,
 21 or that the complaint would be dismissed on other grounds." *Crowley v. Bannister*, 734 F.3d 967,
 22 978 (9th Cir. 2013) (quoting *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980)). Once the
 23 plaintiff learns the name of a doe defendant in discovery, he may file a notice with the court to
 24 substitute the exact allegations against that doe defendant in the complaint with that person's name.
 25 For example, if a plaintiff learned that Yosemite Sam was the person whose conduct he described
 26 in a complaint as John Doe #1, plaintiff may file a notice indicating that he substitutes Yosemite
 27 Sam in place of John Doe #1 described in the complaint at paragraph numbers ____ and/or page
 28 ____ and line _____. *See, e.g., Toscano v. Lewis*, Case No. 12-cv-5893-EMC-PR, 2013 WL 1632691,

at *8–9 (N.D. Cal. Apr. 16, 2013). The notice must identify *each and every instance* in which Yosemite Sam was the person referred to as John Doe #1. If the notice fails to identify and attribute any particular allegation to Yosemite Sam, the notice will not be effective and will not substitute Yosemite Sam in place of John Doe #1 for that specific allegation. However, a plaintiff must file a motion amend the operative complaint, instead of a notice, if he wishes to add defendants or add allegations against a substituted defendant. *Id.*

If Mr. Picozzi wants to substitute Nurse Amanda for Jane Doe nurse #1, or some other Doe defendant, he must file a notice with the court stating which doe defendant he is substituting with Nurse Amanda and identifying each and every paragraph number and/or page number and line number in the Amended Complaint (ECF No. 14) where he described Nurse Amanda. Service will not be ordered for Nurse Amanda until a substitution occurs because Nurse Amanda is not a party to the case at this time.

Accordingly,

IT IS ORDERED:

1. The Motion to Serve Subpoena (ECF No. 32) is GRANTED IN PART AND DENIED IN PART as explained in this Order.
2. The Motion for Proof of Service (ECF No. 43) is DENIED.
3. The Motion for an Order to Serve Defendants (ECF No. 44) is GRANTED.
4. The CCDC Defendants SHALL FILE NOTICE *UNDER SEAL* providing the full name, badge number, address, and telephone number of Defendants officer Brooks, officer Carr, officer Garcia, officer Hans, officer Jolley, and officer Razzo, if available, to facilitate service of the Amended Complaint. If any of these Defendants are no longer employed with CCDC, the notice shall provide the full name, badge number, and last known address and telephone number of the former employees. The CCDC Defendants shall file this notice *under seal* by **November 10, 2016**.
5. The CCDC Defendants SHALL FILE NOTICE on the public docket by **November 10, 2016**, stating that they have complied with this Order.

